

TOAEP

Torkel Opsahl
Academic EPublisher



Quality Control in Preliminary Examination: Volume I

Morten Bergsmo and Carsten Stahn (editors)

E-Offprint:

Runar Torgersen, “The Concern for Quality Control and Norwegian Preliminary Examination Practice”, in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book)). This publication was first published on 6 September 2018. TOAEP publications may be openly accessed and downloaded through the web site www.toaep.org which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

This e-offprint is also available in the Legal Tools Database under PURL <http://www.legal-tools.org/doc/4762c4/>. It is noteworthy that the e-book versions of *Quality Control in Preliminary Examination: Volumes 1 and 2* contain more than 1,000 hyperlinks to legal sources in the Database. This amounts to a thematic knowledge-base that is made freely available as an added service to readers.

© Torkel Opsahl Academic EPublisher, 2018. All rights are reserved.

Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers – Arte dei Maestri di Pietra e Legname – was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

The Concern for Quality Control and Norwegian Preliminary Examination Practice

Runar Torgersen*

3.1. Introduction

The topic of this chapter is the preliminary examination practice in the Norwegian legal system, and I therefore do not analyse other legal systems or international law. Given the general nature of the topic, I nonetheless hope that this domestic perspective could be of some interest to readers from other jurisdictions.

As a starting point, I will say a few words about how the distinction between preliminary examinations and formal investigation is drawn in Norwegian law (Section 3.2.). Based on this analysis, I will give an overview of the (rather limited) scope of preliminary examinations in Norwegian law in different types of cases (Section 3.3.). I then address some quality concerns in preliminary examinations (Section 3.4.). After giving a tentative definition of ‘quality’ (Section 3.4.1.), I will examine why the distinction between preliminary examination and investigation is important, by giving an overview of the most notable differences in the legal framework governing the two forms of inquiry (Section 3.4.2.). Against this background I will point to some quality concerns that call for control and comment briefly on how this is carried out in Norway (Section 3.5.).

3.2. The Distinction between Preliminary Examination and Investigation in Norwegian Law

According to the Norwegian Criminal Procedure Act, an investigation shall be carried out when there are “reasonable grounds to inquire” whether a criminal offence has been committed.¹

* **Runar Torgersen** is Senior Public Prosecutor at the Norwegian Office of the Director of Public Prosecutions. He holds Cand. Jur. and Ph.D. degrees from the University of Oslo. In 2014–16, he led the Norwegian government’s expert group drafting a new Criminal Procedure Act.

¹ Criminal Procedure Act, 22 May 1981, no. 25, Section 224, para. 1 (‘CPA’).

‘Reasonable grounds’ is a requirement for *beginning* as well as *continuing* an investigation, and also applies when conducting any *investigatory step* (for instance, interviewing a witness or collecting physical evidence). If the condition is met, there is also a presumption that there is a *duty* to investigate.

The most important factor when deciding whether there are ‘reasonable grounds’ to investigate is the *likelihood* that a criminal offence has been committed. This does not entail that a fixed threshold of probability must be met – the degree of probability is relative to the severity of the offence in question. Further, it must be considered whether an investigation is *proportionate*, particularly taking into account the severity of the case. The decision whether to investigate must be based on *objective* grounds.²

Before a decision to initiate an investigation is made, the police may conduct preliminary examinations with the aim of determining whether the ‘reasonable grounds’ requirement has been met.

The actual investigation is generally referred to as a ‘purpose governed activity’, with the main purpose being to obtain a sufficient evidentiary basis for deciding whether a prosecutable criminal offence has been committed. An additional aim for the investigation is to provide a basis for the court’s determination of the issue of guilt and the appropriate sanction.³

Any inquiry with this *de facto* purpose is considered to be part of an investigation, regardless of whether a formal decision to investigate exists. Conducting an activity that constitutes investigation in this substantial sense is prohibited if the condition of ‘reasonable grounds’ has not been met. This also implies that if such grounds are established, the information gathering cannot continue as a preliminary examination, even if the inquiries concern a situation where no suspect has yet been identified. The scope of the preliminary examination is therefore limited to obtaining sufficient information to establish whether or not the ‘reasonable grounds’ standard has been met. For serious crimes, this threshold is not very high.

² Norwegian Director of Public Prosecutions, Circular on Investigation, 22 December 1999, no. 3/1999, para. III, 3.

³ CPA, Section 226, para. 1, see *supra* note 1. There are also other investigative purposes including obtaining information to prevent crime and reveal the cause of accidents.

Figure 1 below illustrates the relationship between the purpose of investigation and the purpose of preliminary examinations.

Information-gathering with the *aim* of deciding whether ...

... there are '*reasonable grounds*' to investigate

... a *crime* has been committed

Preliminary Examinations

Investigation

Figure 1. The purpose of preliminary examinations and investigation.

From an analytical point of view, this distinction is clear. At the preliminary stage, the question is whether to investigate or not; at the investigative stage, the question is whether a crime has been committed. However, given that there is a low threshold in Norwegian law for establishing 'reasonable grounds' to investigate, the distinction can be rather subtle.

In practice, it can therefore be difficult to decide when there is enough information available to decide whether to investigate. The general guidelines issued by the Norwegian Director of Public Prosecutions acknowledge that the process of drawing the boundary between preliminary examination and investigation involves a certain amount of discretion.⁴ Simple inquiries over a short period of time are generally accepted as preliminary examinations. In complex cases, particularly those that have international ties, more leeway is given, so that relatively thorough and time-consuming activities could be accepted at the preliminary stage. If no specific person is under suspicion, more inquiries may be accepted during preliminary examinations, including active information-gathering from open sources, police registers and other Norwegian or foreign authorities. Sometimes persons are also questioned during preliminary examinations, but the common view is that a suspect can only be interviewed at the investigation stage. Coercive measures are only available during investigations. The aim of the activity is nonetheless decisive in principle – preliminary examinations are limited to the process of gathering information to decide whether there are 'reasonable grounds' for beginning an investigation.

⁴ Circular on Investigation, para. II, 4, see *supra* note 2.

3.3. The Scope of Preliminary Examinations in Norwegian Law in Different Types of Cases

In the overwhelming majority of Norwegian criminal cases, there is no room for preliminary examinations. Based on the information received when the crime is reported, a decision is made whether to *investigate* or *discontinue* the case without investigation. Generally, any serious inquiry into a possible crime will be considered investigation.

There are however important exceptions where information is gathered in preliminary examinations for different reasons, primarily to secure sufficient information to make a justified decision whether to investigate or not. The importance of a proper basis for the decision is related to the possible damaging effects of opening a formal investigation, particularly because of the stigma of being under investigation, which can lead to unnecessary inconveniences for persons who may have been unjustly accused, for instance, unwarranted public attention, confusion or outrage. Opening an investigation can also cause unnecessary tension in the relationships with other States.

This means that preliminary examinations are typically carried out in certain types of cases by a few specific agencies. One such category consists of the cases handled by the Norwegian Bureau for the Investigation of Police Affairs. The Bureau handles allegations of police brutality and other misconduct committed by the police or prosecutors. Before a decision is made whether to investigate, the Bureau collects any case files connected to the allegations and conducts an interview with the person who made the accusation. These preliminary examinations typically do not take much time.

Cases that the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime is responsible for can be considered a second category. This unit deals mainly with complex crimes, and can choose quite freely whether to handle a case itself or refer it to the ordinary police. As a basis for prioritizing which cases to proceed with, preliminary examinations are quite common, and may include relatively extensive inquiries over some period of time.

A third category is made up of the cases handled by the National Criminal Investigation Service, particularly international crimes or cases otherwise involving foreign States. In Norway, very few such cases have been tried in court.

It is worth mentioning that specific provisions concerning international crimes were adopted in 2008, and we have had only one prosecution based on the new legislation.

The case concerned war crimes and crimes against humanity committed during the war in the former Yugoslavia. The Norwegian Supreme Court found that the application of the new legislation would constitute a breach of the constitutional prohibition against retroactive legislation.⁵ The accused was instead sentenced to eight years of imprisonment for illegal deprivation of liberty in accordance with the law applicable at the time when the crimes were committed. Since this decision, only one case involving international crimes has been brought before the Norwegian courts. This case was related to the genocide in Rwanda in 1994, and the act was formally prosecuted under the ordinary murder statute.⁶

We do however have quite a few preliminary examinations pending regarding international crimes. Each year, the National Criminal Investigation Service receives 30–40 cases for inquiry from the Norwegian Directorate of Immigration. Additionally, a large amount of preliminary investigations concerning international crimes are initiated on the basis of police intelligence information.

3.4. Quality Concerns in Preliminary Examinations

3.4.1. ‘Quality’ in Criminal Procedure

‘Quality’ in criminal procedure can be understood as handling cases in accordance with reasonable expectations, such as:

- correct fact-finding;
- lawful procedures, including respect for the rights and interests of suspects and victims;
- steady progress throughout the investigation and a prosecutorial decision on the merits of the accusation within reasonable time; and
- transparency and some sort of supervision.

With these expectations in mind, it is of interest to briefly explore the relevant legal implications of the distinction between preliminary examinations and investigations.

⁵ Judgement, 3 December 2010, HR-2010-2057-P.

⁶ Borgarting Appellate Court, Judgement, 16 January 2015, LB-2013-41556.

3.4.2. Lack of Regulation as a Cause of Concern in Preliminary Examinations

All prosecutorial activity must comply with the basic quality requirements, including impartiality and objectivity.⁷ However, the preliminary examination stage is not regulated in any detail in Norwegian law. By contrast, the Criminal Procedure Act includes a number of provisions concerning the investigation stage – both general requirements and regulations for specific investigative steps. The rules and practices regarding supervision as well as managing systems are also mainly directed at formal investigations. This is illustrated in Figure 2 below.

Information-gathering with the *aim* of deciding whether ...

... there are '*reasonable grounds*' to investigate

... a *crime* has been committed

Preliminary Examinations Few regulations	Investigation Detailed regulations
<ul style="list-style-type: none"> • no obligation to seek favourable information • no obligation to specify the suspicion • no right for the suspect to be notified • no access to the case file • no right to refute allegations • no right to demand specific inquiries • no access to court • no right to speedy inquiries 	<ul style="list-style-type: none"> • obligation to seek favourable information • obligation to specify the suspicion • right for the suspect to be notified • access to the case file • right to refute allegations • right to demand specific inquiries • access to court • right to speedy investigation

Figure 2. Applicable regulations during preliminary examinations and investigation.

The lack of formal regulation at the stage of preliminary examinations calls for a comparison with the legal framework governing the investigation stage. Without going into any detail, I will point to some important differences.

⁷ CPA, Section 60 and Section 55, para. 4, see *supra* note 1.

3.4.2.1. Seeking Information in Favour of a Suspect

If an investigation is directed towards a specific suspect, there is an obligation for the police and the prosecutor to “seek to clarify both the evidence against him and the evidence in his favour”.⁸ No similar explicit regulation applies to preliminary examinations, and even if all prosecutorial activity must be carried out in an objective manner, there is no clear obligation to seek information in favour of a suspect at this stage.

3.4.2.2. Specification of the Suspicion

At the investigation stage, the obligation to inform the suspect makes it necessary to specify the suspicion. Also, if a prosecutor orders the police to investigate, or requests authorization from the courts to do so, he must reflect on how broadly the suspected crimes can and should be described. Without such an order or request, there is a risk that the inquiries are not sufficiently focused. This can lead to inefficient inquiries, generating excessive or insufficient information regarding the alleged crimes.

3.4.2.3. Notification and Access to Information

As a general rule – subject to important exceptions – suspects and victims are normally given notice about an investigation, the details of the allegations and access to the case file. Generally, no notice or access to the case file is given during preliminary examinations, even if directed towards specific persons.

3.4.2.4. Right to Refute the Allegations and to Offer Additional Information

Whereas during an investigation, the suspect shall be given an opportunity to refute the grounds on which the suspicion is based and to put forward any circumstances that count in his favour,⁹ no such rights are available during preliminary examinations.

3.4.2.5. Right to Demand Further Inquiries and Access to Court

During investigations, the police will ask the suspect if there are any investigative steps he wants carried out. The suspect may also petition that the courts institute judicial proceedings to dispel the suspicion, such as

⁸ *Ibid.*, Section 226, para. 3.

⁹ *Ibid.*, Sections 92 and 232.

questioning a witness in court.¹⁰ However, again, no such rights apply during preliminary investigations.

3.4.2.6. Speedy Inquiries

An investigation shall be carried out “as quickly as possible and in such a way that no one is unnecessarily exposed to suspicion or inconvenience”.¹¹ No similar regulation applies to preliminary examinations. In addition, preliminary examinations are not in the same detail as investigations registered in key statistics regarding case management and backlog monitoring of these cases draw limited attention.

3.5. Quality Control in Preliminary Examinations

When discussing the need for quality control in preliminary examinations, it is important to keep in mind the causes for concern that I have outlined above. The lack of regulations concerning preliminary examinations gives rise to a need for control mechanisms that can prevent substantive investigations from being carried out under the guise of preliminary inquiries. If this possibility is not ruled out, persons can be denied their rights, and there is a risk that the prosecution service does not adhere to applicable obligations. There is also a risk that the condition for investigative steps, ‘reasonable grounds’ for inquiry, is circumvented. At the largely unregulated stage of preliminary examinations, it is important to develop practices that secure the best quality possible concerning progress as well as the integrity of the information that is collected. Finally, the way things are done should not develop without reflection and oversight – at least within the prosecution service.

In the Norwegian system, quality control has to be carried out mainly within the prosecution service, which has three levels: first level prosecutors are integrated in the police organization; at the second level, there are prosecutors in ten regions and two national units; the third level is the Office of the Director of Public Prosecutions. The prosecution service is responsible for both preliminary examinations and investigations.

Ideally, all prosecutors handling a case should pay attention to the more or less inherent quality concerns involved in preliminary examinations, and be aware of the question of when to make a formal decision to

¹⁰ *Ibid.*, Section 241.

¹¹ *Ibid.*, Section 226, para. 4.

start an investigation. To achieve this, it is probably necessary to address the distinction between preliminary examinations and investigation in a structured manner. This can be done through general regulations and by evaluation of a selection of cases.

In 1999, the Norwegian Director of Public Prosecutions published a Circular on Investigation that certainly raised the general awareness among prosecutors regarding when an inquiry should be considered an investigation.¹² However, the circular does not detail how preliminary examinations should be carried out to adhere to basic quality requirements.

Whether or not the circular has been complied with is sometimes considered when a case is examined by a prosecutor at a higher level. Supervision can take place more or less by coincidence if a prosecutor at a higher level has to deal with the case, which can happen for several reasons (to decide whether to prosecute, during consultation initiated by a police prosecutor or when a complaint has been filed). In addition, the second level prosecutors regularly carry out inspections including evaluating a selection of cases. The supervision will pay particular attention to one or more topics that is communicated to the unit being inspected, and one such topic could be preliminary examination practices.

The most structured evaluations of preliminary examinations practices are probably carried out by the National Authority for Prosecution of Organised and Other Serious Crime ('NAST'). This second level prosecution office is responsible for the activities of the National Criminal Investigation Service (Kripos). NAST will look into the number of cases handled by Kripos that are at the stage of preliminary examinations, the time spent on the cases so far, and whether formal investigations should have been opened in any of the cases. Further, there is a dialogue as part of the supervision to get an overview of cases that are likely to make it to the stage of investigation.

All in all, there seems to be a fair attention to and control of the scope of preliminary examinations. The progress and total time spent at this stage seems to be at least fairly well monitored. However, it is not always controlled, and there is a risk that the investigation process can be delayed. Controlling the content of preliminary examinations appears to be one of the main challenges. There is reason to suspect that the inquiries in some cases may lack sufficient direction. If this is true, it could be help-

¹² See *supra* note 2.

ful to clarify what information is necessary to decide whether to start an investigation at the outset of a preliminary investigation, and to draw up a detailed plan on how the inquiries should proceed. The first step towards establishing a practice along these lines is to draw attention to the need for a more structured approach to preliminary examinations.

Publication Series No. 32 (2018):

Quality Control in Preliminary Examination: Volume I

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book).

TOAEP

Torkel Opsahl
Academic EPublisher

Torkel Opsahl Academic EPublisher

E-mail: info@toaep.org

URL: www.toaep.org

CILRAP:

Centre for International
Law Research and Policy

ISBN 978-82-8348-123-5



PURL: <http://www.legal-tools.org/doc/4762c4/>